BEST AVAILABLE COPY

Office-Supreme Court, U.S.
FILED
SEP 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-208

IN THE

# Supreme Court of the United States

October Term, 1984

AUGUST CAITO,
*Petitioner,*

vs.

STATE OF INDIANA,
*Respondent.*

## ON APPEAL FROM THE SUPREME COURT OF INDIANA

## MOTION TO DISMISS THE JURISDICTIONAL STATEMENT OF PETITIONER, AUGUST CAITO

MR. OWEN M. MULLIN
*Attorney of Record*
116 North Delaware Street
Indianapolis, Indiana 46204
Telephone: (317) 639-0391

MR. JAMES CLARK
*Attorney of Record*
120 E. Market Street, #715
Indianapolis, Indiana 46204
Telephone: (317) 637-1321

MR. ALEX R. VOILS, JR.
110 North Delaware Street
Indianapolis, Indiana 46204
Telephone: (317) 634-9800

*Attorneys for Petitioner*

LINLEY E. PEARSON
*Attorney General of Indiana*

WILLIAM E. DAILY
*Deputy Attorney General*

LISA M. PAUNICKA
*Deputy Attorney General*

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6237

*Attorneys for Respondent*

Central Publishing Company, Inc., Indianapolis, IN 46203

12pp

## QUESTION PRESENTED FOR REVIEW

Whether or not the Petitioner's privilege against compulsory self-incrimination was violated when he, a target witness, was granted both use immunity and derivative use immunity and was ordered to testify before a grand jury?

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented for Review | i |
| Table of Authorities | iii |
| Opinion Below | 1 |
| Statement of the Case | 2 |
| Summary of the Argument | 2 |
| Argument | 3 |
| Conclusion | 7 |

## TABLE OF AUTHORITIES


*Cases:* *Pages:*

*Kastigar v. United States*, (1972) 406 U.S. 441, 92 S.Ct. 1653 ..... 5, 6

*Lefkowitz v. Turley*, (1973) 414 U.S. 70, 94 S.Ct. 316 5

*Murphy v. Waterfront Commission of New York*, (1964) 378 U.S. 52, 84 S.Ct. 1594 ..... 6

STATUTES:

IC § 35-34-2-6 (Burns Supp. 1984) ..... 3, 4

IC § 35-34-2-8 (Burns Supp. 1984) ..... 3, 6, 7

No. 84-208

IN THE

# Supreme Court of the United States

October Term, 1984

AUGUST CAITO,
*Petitioner,*

vs.

STATE OF INDIANA,
*Respondent.*

## ON APPEAL FROM THE SUPREME COURT OF INDIANA

## MOTION TO DISMISS THE JURISDICTIONAL STATEMENT OF PETITIONER, AUGUST CAITO

Respondent, the State of Indiana, respectfully requests that the court grant the Respondent's motion to dismiss and, thereby, refuse to review the decision entered by the Supreme Court of Indiana in Cause Number 483 S 119 on February 29, 1984.

## OPINION BELOW

The Supreme Court of Indiana entered an opinion in this cause on February 29, 1984. The opinion is set forth in Petitioner's Appendix at A-1 and is officially reported at 459 N.E.2d 1179 (Ind. 1984). A petition for rehearing was

timely filed and was denied by the Supreme Court of Indiana on April 19, 1984.

## STATEMENT OF THE CASE

The Petitioner, August Caito, was subpoenaed, as a target witness, to testify before a grand jury. The Petitioner complied with the subpoena. However, due to the advice of his attorney, the Petitioner refused to testify, after being sworn, except to identify himself. The Petitioner contended that his answers to other questions might incriminate him.

Subsequently, the Respondent, the State of Indiana, petitioned the trial court pursuant to IC § 35-34-2-8 (Burns Supp. 1984), to grant use immunity and derivative use immunity and to order the Petitioner to respond to a list of written questions. The trial court not only granted the Respondent's motion, but also ordered the Petitioner to answer the written interrogatories. The Petitioner again appeared before the grand jury and refused to testify claiming his privilege against self-incrimination. U.S. Const. amend. V; Ind. Const. art. I, § 14.

Consequently, the trial court determined the Petitioner to be in direct contempt of court, fined him five hundred dollars ($500.00), and ordered that he be held in jail for sixty (60) days or until he presented himself to the court to advise that he would testify before the grand jury as ordered. The trial court, however, stayed the contempt sanctions pending review by the Supreme Court of Indiana. The Supreme Court affirmed the judgment of the trial court.

## SUMMARY OF THE ARGUMENT

The Indiana use immunity statute, IC § 35-34-2-8, does not violate the Fifth Amendment of the United States

Constitution since the statute compels testimony of target witnesses in exchange for use immunity and derivative use immunity which gives a witness protection equivalent to the Fifth Amendment privilege.

## ARGUMENT

The Petitioner, August Caito, was subpoenaed, as a target witness, to testify before a grand jury. The Petitioner complied with the subpoena. However, due to the advice of his attorney, the Petitioner refused to testify, after being sworn, except to identify himself. Consequently, the Respondent, the State of Indiana, petitioned the trial court pursuant to IC § 35-34-2-6 (Burns Supp. 1984) and IC § 35-34-2-8 (Burns Supp. 1984) to grant use and derivative use immunity and to order the Petitioner to respond to a list of written questions. IC § 35-34-2-6 reads:

> (a) Any witness may file a motion to quash a subpoena duces tecum directed to that witness. The motion must include a statement of the facts and grounds in support of the objection to the subpoena. The court shall:
>
> (1) Promptly conduct a hearing on the motion; and
>
> (2) At the conclusion of the hearing, enter findings in support of its ruling.
>
> (b) A target who is subpoenaed may move to quash a subpoena based upon his privilege against self-incrimination. The court shall grant the motion, unless the prosecuting attorney makes a written request that the target be granted use immunity in accordance with section 8 [35-34-2-8] of this chapter. Upon request by the prosecuting attorney, the court shall grant use immunity to the target and order him to comply with the subpoena.

IC § 35-34-2-8 provides:

> (a) Upon request by the prosecuting attorney, the court shall grant use immunity to a witness before the grand jury. The court shall instruct the witness by written order or in open court that any evidence the witness gives before the grand jury, or evidence derived from that evidence, may not be used in any criminal prosecution against that witness, unless the evidence is volunteered by the witness or is not responsive to a question by the grand jury or the prosecutor. The court shall then instruct the witness that he must answer the questions asked and produce the items requested.
>
> (b) A grant of use immunity does not prohibit the use of evidence the witness gives in a prosecution for perjury under IC 35-44-2-1.
>
> (c) If a witness refuses to give evidence after he has been granted use immunity, he shall be brought before the court and the court shall proceed as if the witness had refused in open court.

The trial court not only granted the Respondent's motion, but also ordered the Petitioner to answer the written interrogatories. In his jurisdictional statement, the Petitioner challenges the constitutionality of the immunity statute, IC § 35-34-2-8.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The amendment not only protects an individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, where the answers might incriminate him in future criminal proceedings. This privilege, however, is not inviolable. It must be balanced against the government's legitimate demands to compel citizens to testify so that the truth surrounding a criminal

incident may be discovered. *Lefkowitz v. Turley*, (1973) 414 U.S. 70, 94 S.Ct. 316. Moreover, an immunity statute will be upheld where the immunity granted is coextensive with the scope of the privilege. A witness must be left in substantially the same position as if he had properly exercised his privilege to remain silent. *Kastigar v. United States*, (1972) 406 U.S. 441, 92 S.Ct. 1653. In the present case, the Petitioner contends that the grant of use immunity and derivative use immunity to a target witness does not leave a target witness in such a position.

When a witness testifies under the auspices of an immunity act, the extent of the immunity granted has significant ramifications for the witness as well as the government. If the witness receives *transactional* immunity, he will be secure from any future indictment or conviction for the offenses to which his compelled testimony relates. In essence, transactional immunity operates as a complete pardon for the offenses disclosed by the witness' testimony. An award of *use* immunity simply prohibits prosecutorial authorities from using compelled testimony in any respect but does not proscribe future prosecutions. In addition, any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution under *derivative use* immunity.

In the instant case, the Petitioner asserts that no immunity statute, however drafted, can afford a lawful basis for compelling incriminating testimony. It is true that use immunity, alone, cannot protect an individual's right not to give evidence against himself because the compelled testimony may be employed by investigators who have thereby gained knowledge of the details of the crime and other sources of incriminating evidence. Nevertheless, it is well established that statutes which compel the testimony of target witnesses in exchange for both use immunity and derivative use immunity are

constitutional. *Kastigar, supra.* In *Kastigar,* the United States Supreme Court ruled:

> We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to...criminal acts."' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. *Kastigar, supra,* 406 U.S. at 453, 92 S.Ct. at 1661.

Clearly, IC § 35-34-2-8 does not violate the Fifth Amendment of the United States Constitution or art. I, § 14 of the Indiana Constitution. Moreover, a person accorded use immunity and derivative use immunity and is subsequently prosecuted is not dependent upon the integrity and good faith of the prosecuting authorities for the preservation of his rights. Quoting, in part, *Murphy v. Waterfront Commission of New York,* (1964) 378 U.S. 52, 84 S.Ct. 1594, the *Kastigar* court stated:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have

> the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Thus, the immunity provided by IC § 35-34-2-8 leaves a witness in substantially the same position as if the witness claimed the Fifth Amendment privilege. The immunity is coextensive with the privilege.

## CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that its Motion to Dismiss the Jurisdictional Statement of Petitioner be granted.

Respectfully submitted,

LINLEY E. PEARSON
*Attorney General of Indiana*

WILLIAM E. DAILY
*Deputy Attorney General*

LISA M. PAUNICKA
*Deputy Attorney General*

*Attorneys for Respondent*

kls:0459p